

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SCOTT F. FIAHLO,

Plaintiff,

v.

G. HERRERA, et. al.,

Defendants.

Case No.: 14cv1378 GPC-MDD

REPORT AND
RECOMMENDATION OF
UNITED STATES MAGISTRATE
JUDGE RE: DEFENDANTS'
MOTION TO DISMISS

[ECF No. 32]

This Report and Recommendation is submitted to United States District Judge Gonzalo P. Curiel pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California. For the reasons set forth herein, the Court **RECOMMENDS** Defendants' Motion to Dismiss be **GRANTED**.

I. Procedural Background

Plaintiff Scott F. Fiahlo is a state prisoner proceeding *pro se* and *in forma pauperis* with a complaint alleging a violation of the Civil Rights Act 42 U.S.C. § 1983. (ECF No. 1). Plaintiff filed his Complaint on June 5, 2014. (*Id.*). Defendants Kissol and Anderson, California Department of Corrections and Rehabilitation (CDCR) Correctional

1 Officers, filed a Motion to Dismiss on March 4, 2015. (ECF No. 26).
2 Defendant Herrera, a registered nurse, subsequently submitted a
3 Notice of Joinder joining Defendants' Motion to Dismiss on March 6,
4 2015. (ECF No. 28). Plaintiff filed a Response in Opposition to
5 Defendants' Motion to Dismiss ("Response") on March 23, 2015. (ECF
6 No. 29). On April 4, 2015, Defendants Kissol and Anderson submitted a
7 reply. (ECF No. 30).

8 **II. Statement of Facts**

9 Plaintiff alleges that on January 25, 2014, while incarcerated at
10 Calipatria state prison, he received news via telephone from his family
11 that his eldest brother had been killed. (ECF No. 1 at 3). Plaintiff
12 claims that this distressing news caused him to lose track of the copious
13 amounts of water he was drinking, and that he became "very sick" as a
14 result. (*Id.*). Plaintiff then began vomiting, urinating, and defecating
15 on himself and within his cell, which he alleges caused him to slip and
16 fall on his head. (*Id.*). As a result of the fall, Plaintiff further asserts
17 that he became temporarily paralyzed in his movements and voice, but
18 that he remained "still conscious," and able to hear. (*Id.*).
19

1 While paralyzed within his cell, Plaintiff claims that he overheard
2 Defendant Anderson telling Plaintiff to “get up” and asking why
3 Plaintiff was on the floor. (*Id.*). Defendant Anderson left and then
4 returned shortly after with a registered nurse, Defendant Herrera.
5 (*Id.*). Plaintiff contends that Defendants Anderson and Herrera
6 “started ‘laughing at [him]’ ” and “making jokes,” stating that Plaintiff
7 was drunk and needed to “sleep it off.” (*Id.*). Plaintiff also asserts that
8 he overheard Defendant Kissol, a building control tower officer, tell
9 Defendants Anderson and Herrera to leave Plaintiff in his cell because
10 he was “just drunk,” and made jokes at Plaintiff’s expense as well. (*Id.*).
11 Consequently, Plaintiff claims that due to Defendants’ inaction, he did
12 not receive medical treatment for another five to seven hours, leading to
13 a coma lasting two to four days, in violation of his Eighth Amendment
14 rights. (*Id.*).

15 On March 7, 2014, Plaintiff submitted an inmate administrative
16 appeal by filing a CDCR Form 602, (*Id.* at 52-53), and an inmate
17 healthcare appeal by filing a CDCR Form 602 HC, (*Id.* at 55). In his
18 administrative appeal, Plaintiff prayed for a “full investigation” and a
19 “detailed response of the investigation.” (*Id.* at 52). Further, in his

1 healthcare appeal, Plaintiff demanded that Defendant Herrera be fired,
2 that her “medical license” be revoked, and requested a justification for
3 the alleged misconduct. (*Id.* at 55).

4 A memorandum from the CDCR second level appeals’ staff, dated
5 April 8, 2014, notified Plaintiff that his appeal was “granted,” in that
6 “[a]n investigation is being conducted by the Office of Internal Affairs.”
7 (*Id.* at 51). Upon conclusion of this investigation, Plaintiff would be
8 notified of the results. (*Id.*). Additionally, in response to Plaintiff’s
9 healthcare appeal, the CDCR second level appeals’ staff informed
10 Plaintiff in a May 15, 2014 memorandum that his healthcare appeal
11 was “partially granted,” in that the matter would also be referred to the
12 Officer of Internal Affairs for “follow-up and a possible investigation.”
13 (*Id.* at 54). The second level appeals staff informed Plaintiff that he
14 would be notified as to the results of the investigation into the
15 allegations stated in his healthcare appeal. (*Id.*). Both memoranda
16 considered the appeal a staff complaint, requiring the details of any
17 inquiry to remain confidential.

18 On June 5, 2014, Plaintiff filed this Complaint without awaiting
19 the results of the pending investigations. Plaintiff requests that the

1 court grant him \$50,000 or more in general and punitive damages, as
2 well as order the firing of the named Defendants from CDCR
3 employment. (*Id.* at 7).

4 **III. Summary of Arguments**

5 In his Complaint, Plaintiff alleges that staff misconduct
6 constituted cruel and unusual punishment, depriving him of his
7 Constitutional rights under the Eighth Amendment. (ECF No. 1 at 3).
8 Specifically, Plaintiff claims that Defendants refused to provide him
9 adequate medical treatment because Defendants falsely believed he was
10 intoxicated, causing Plaintiff further medical harm and suffering due to
11 delay in treatment. (*Id.*).

12 Defendants urge dismissal of the Complaint under Federal Rule of
13 Civil Procedure 12(b)(6), because Plaintiff admits in his Complaint that
14 he has failed to exhaust all administrative remedies as required by 42
15 U.S.C. § 1997e(a). (ECF No. 26 at 6).

16 In his opposition, Plaintiff claims that he is “not obligated to
17 pursue the appeal through the third level in order to exhaust
18 administrative remedies,” since his appeals have been granted or
19 partially granted at a lower level. (ECF No. 29 at 1). Therefore,

1 Plaintiff asserts his claims are fully exhausted and the Defendants'
2 Motion to Dismiss should be denied. (*Id.*).

3 In their Reply, Defendants disagree that the grant of an ongoing
4 investigation at a lower level constitutes exhaustion, and distinguish
5 the cases Plaintiff relies upon. (ECF No. 30).

6 **IV. Standard of Review**

7 Failure to exhaust is an affirmative defense that defendants must
8 raise and prove. *See Jones v. Bock*, 549 U.S. 199, 212-17 (2007)
9 (explaining that inmates are not required to plead specifically or
10 demonstrate exhaustion in their complaints). In the rare case a
11 prisoner's failure to exhaust is clear from the face of the complaint, a
12 “defendant may successfully move to dismiss under Rule 12(b)(6) for
13 failure to state a claim.” *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir.
14 2014). Although a motion to dismiss is not the appropriate method for
15 deciding disputed factual questions relevant to exhaustion,
16 “[e]xhaustion should be decided, if feasible, before reaching the merits
17 of a prisoner's claim.” *Id.* at 1170.

18 Since exhaustion is an affirmative defense, Defendants bear the
19 burden of demonstrating “that pertinent relief remained available,

1 whether at unexhausted levels of the grievance process or through
2 awaiting the results of the relief already granted as a result of the
3 process.” *Brown v. Valoff*, 422 F.3d 926, 936-37 (9th Cir. 2004) (citing
4 *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003)).

5 **V. Analysis**

6 Under the Prison Litigation Reform Act (PLRA), “[n]o action shall
7 be brought with respect to prison conditions under . . . [42 U.S.C. §
8 1983], or any other Federal law, by a prisoner confined in any jail,
9 prison, or other correctional facility until such administrative remedies
10 as are available are exhausted.” 42 U.S.C. § 1997e(a) (West 2014); *see*
11 *also Booth v. Churner*, 532 U.S. 731, 736 (2001) (requiring exhaustion
12 even where relief sought cannot be granted by administrative process);
13 *Morton v. Hall*, 599 F.3d 942, 945 (9th Cir. 2010). “[A] prisoner must
14 complete the administrative review process in accordance with the
15 applicable procedural rules . . . as a precondition to bringing suit in
16 federal court.” *Woodford v. Ngo*, 548 U.S. 81, 88 (2006). Prisoners
17 must exhaust their administrative remedies prior to filing suit, not
18 during the pendency of the suit. *See McKinney v. Carey*, 311 F.3d 1198,
19 1199 (9th Cir. 2002) (per curiam) (requiring dismissal without prejudice

1 where a prisoner “d[oes] not exhaust his administrative remedies prior
2 to filing suit but is in the process of doing so when a motion to dismiss is
3 filed”).

4 Prisoners are required to exhaust prison administrative
5 procedures regardless of whether the type of relief they seek matches
6 the type of relief available through administrative procedures. *See*
7 *Booth*, 532 U.S. at 741; *see also Morton*, 599 F.3d at 945. However, the
8 PLRA requires exhaustion only of those administrative remedies “as are
9 available,” and the PLRA does not require exhaustion when
10 circumstances render administrative remedies “effectively unavailable.”
11 *Nunez v. Duncan*, 591 F.3d 1217, 1223-26 (9th Cir. 2010) (holding that
12 plaintiff’s failure to timely exhaust his administrative remedies was
13 excused because he took reasonable steps to exhaust his claim and was
14 precluded from exhausting by the warden’s mistake). A prisoner’s
15 participation in an internal investigation of official conduct does not
16 constitute constructive exhaustion of administrative remedies. *See*
17 *Panaro v. City of N. Las Vegas*, 432 F.3d 949, 953-54 (9th Cir. 2005).

18 Defendant contends that the Plaintiff admits in his complaint that
19 the second level appeals process has yet to be concluded. Referring to

1 his administrative and healthcare appeals in his Complaint, Plaintiff
2 concedes that “there has been no conclusion [sic] yet on both 602s, they
3 [CDCR officials] are still investigating The CDCR authorities have
4 not given me no indications of how long or estimations [sic] these
5 investigations will take.” (ECF No. 1 at 6) (internal quotation marks
6 omitted). Defendants argue that within the CDCR staff misconduct
7 appeals process, there remains a third level of review that Plaintiff
8 must pursue, under PLRA § 1997e(a), before he can bring a Complaint
9 before this Court.

10 Plaintiff claims that he has received “the full extent of relief”
11 available and is “not obligated to pursue the appeal through the third
12 level in order to exhaust administrative remedies,” because he received
13 favorable decisions granting an investigation. (ECF No. 29). In his
14 Response, Plaintiff relies on the decision in *Brown v. Valoff*, 422 F.3d
15 926 (9th Cir. 2004).

16 Plaintiff’s reliance on the decision in *Brown* is misplaced. In
17 *Brown*, the Ninth Circuit considered two cases in which both prisoners
18 utilized the inmate appeals process by filing appeals but failed to
19 pursue their appeals up to the third and final level of review after

1 receiving responses at intermediate levels of review. *Brown*, 422 F.3d
2 at 929. In distinguishing the two cases before it, the court established
3 that a prisoner has not exhausted his claim if an investigation remains
4 pending, some relief is still available, and CDCR has not informed
5 plaintiff that no remedies are available. *Id.* at 935, 942.

6 It is apparent from the face of Plaintiff's complaint that he has
7 failed to exhaust. Plaintiff admits second level appeal investigations
8 are still pending. As the *Brown* court held, "[u]ntil the staff misconduct
9 investigation was completed, the Department had not had a full
10 opportunity to investigate the complaint and to develop an
11 understanding of the facts underlying it. Moreover, even absent any
12 specific information regarding the results of the investigation, it is
13 conceivable that a prisoner who learns that his allegations were
14 "partially sustained" would be satisfied that he had been heard and
15 proceed no further." *Id.* at 942.

16 Indeed, in this instance, much of the very relief Plaintiff requested
17 is still available, though not in the level of detail he would like.

18 Plaintiff requested a "full investigation" and a "detailed response of the
19 investigation" in his administrative appeal, (*Id.* at 52), and the firing of

1 Defendant Herrera, revocation of her “medical license,” and a
2 justification for the alleged misconduct in his healthcare appeal, (*Id.* at
3 55). Under *Booth*, Plaintiff is still required to exhaust prison
4 administrative procedures regardless of whether the relief sought
5 matches the type of relief available through administrative procedures.
6 See *Booth*, 532 U.S. at 739 and 741 n.6 (“an inmate must exhaust
7 irrespective of the forms of relief sought and offered through
8 administrative avenues,” and “regardless of the fit between a prisoner's
9 prayer for relief and the administrative remedies possible”). Plaintiff
10 was informed that upon completion of an investigation, he will receive
11 further relief in the form of notification as to whether the allegations
12 were sustained, not sustained, unfounded, exonerated, or there was no
13 finding. (*Id.* at 54). Moreover, as Defendants argue, if the investigation
14 yields the result “not sustained,” “unfounded,” “exonerated,” or “no
15 finding,” Plaintiff will not have achieved vindication for his allegations
16 of staff misconduct, nor receive an exoneration from the allegation of
17 intoxication. (ECF 29 at 4-5). Defendants further state that Plaintiff
18 will have the opportunity to appeal these unfavorable results at the
19 third level of appeal. (*Id.*). This further demonstrates the possibility

1 that some relief, through the exoneration of claims of intoxication and
2 the acknowledgement of the legitimacy of his claims of staff misconduct,
3 remains available. Plaintiff acknowledges he has not received the
4 results from the investigation. This demonstrates that the very relief
5 Plaintiff sought – an investigation and the results – are still available
6 through the CDCR grievance process that Plaintiff prematurely
7 abandoned.

8 In addition, Plaintiff has not been informed that no further
9 remedies are available. To the contrary, the second level appeal
10 response specifically advised Plaintiff that it is only “[o]nce a decision
11 has been rendered at the Third Level, your administrative remedies will
12 be considered exhausted.” (ECF No. 1 at 51). Further, in his
13 healthcare appeal, Plaintiff was advised that “[a]llegations of staff
14 misconduct do not limit or restrict the availability of further relief via
15 the inmate appeals process.” (*Id.* at 54).

16 Finally, Plaintiff also relies on the decisions *Brady v. Attygala*,
17 196 F.Supp.2d 1016 (C.D. Cal. 2002) and *Gomez v. Winslow*, 177
18 F.Supp.2d 977 (N.D. Cal. 2001). *Brady* and *Gomez* are dissimilar from
19 Plaintiff’s case. In *Brady* and *Gomez*, the courts determined that prison

1 officials had offered and/or provided the prisoners all of the relief they
2 had requested. Therefore the prisoners were not required to exhaust
3 the highest level of review prior to filing their complaints in federal
4 court. *See Brady*, 196 F. Supp 2d at 1023; *Gomez*, 177 F. Supp. 2d at
5 984. In this case, however, Plaintiff's appeals were granted and
6 partially granted only in that the Office of Internal Affairs would
7 conduct investigations, the results of which remain forthcoming. The
8 grievance process continues to offer Plaintiff the "possibility of some
9 relief for the action complained of." *See Booth*, 532 U.S. at 738-39.

10 The Court finds that Defendants have met their burden to show
11 that it is apparent from the face of the pleadings that Plaintiff failed to
12 exhaust his claim of cruel and unusual punishment under PLRA §
13 1997e(a) before filing this action. Accordingly, this Court
14 **RECOMMENDS** that Defendants' Motion to Dismiss be **GRANTED**.

15 **VI. Conclusion**

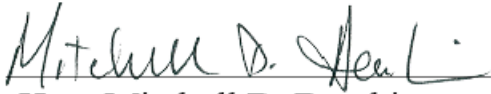
16 For the reasons set forth herein, this Court **RECOMMENDS** that
17 the Court issue an Order approving and adopting this Report and
18 Recommendation. The Court further **RECOMMENDS** Defendants'
19 Motion to Dismiss be **GRANTED**.

1 This Report and Recommendation will be submitted to the United
2 States District Judge assigned to this case, pursuant to the provisions of
3 28 U.S.C. § 636(b)(1). Any party may file written objections with the
4 Court and serve a copy on all parties by **May 15, 2015**. The document
5 shall be captioned "Objections to Report and Recommendation." Any
6 reply to the objections shall be served and filed by **May 22, 2015**.

7 The parties are advised that failure to file objections within the
8 specified time may waive the right to raise those objections on appeal of
9 the Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

10 **IT IS SO ORDERED.**

11
12 Date: April 24, 2015

13 
14 Hon. Mitchell D. Dembin
United States Magistrate Judge